NO. 20918

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOWARD GERALD MINKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in one count of a two-count indictment following trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was tried under a two-count indictment which also included Kevin Patrick Rafferty and Stanley Alvin Garelle as named co-defendants. Count One of the indictment alleged that Garelle, Rafferty, appellant Minkin, and divers other persons to the Grand Jury unknown, agreed, confederated, and conspired together to commit the offenses of knowingly, with intent to defraud the United States, importing, bringing into the United States, smuggling, and clandestinely introducing marihuana, without presenting such marihuana for inspection and without entering and declaring it, and concealing and facilitating the concealment and transportation of marihuana which had been imported into the United States contrary to law, such conspiracy being in violation of Title 21, United States Code, Section 176a. One overt act was alleged [C. T. 2-3]. 1/

Count Two alleged that defendant Rafferty, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 79 pounds of marihuana, which marihuana should have been invoiced, and knowingly imported and brought into the United States from Mexico said marihuana contrary to law, and that appellant and defendant Garelle knowingly aided, abetted, counseled, induced,

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1/ "C. T." refers to the Clerk's Transcript of Record.

and procured the commission of that offense [C. T. 4].

Appellant was tried alone [C. T. 40]. His jury trial commenced on November 2, 1965, before United States District Judge James M. Carter [R. T. 42, 47]. 2/ Count One was withdrawn from the jury [R. T. 167-68]. Appellant was found guilty as charged in Count Two of the indictment on November 3, 1965 [R. T. 226-27].

Thereafter, on February 7, 1966, appellant was committed to the custody of the Attorney General for five years [C. T. 28]. He subsequently filed notice of appeal [C. T. 29].

III

Appellant alleges the following points upon appeal:

"1. The trial court erred in trying the case upon the indictment charging violation of United States Code, Title 21, Section 176a.

"2. The trial court erred in submitting the case to the jury upon the charge contained in the indictment.

"3. The trial court erred in sentencing appellant under the mandatory provisions of United States Code, Title 21, Section 176a and Section 7237(d) of the Internal Revenue Code of 1954.

"4. The trial court erred in severing the cases of Kevin Patrick Rafferty and Stanley Alvin Garelle

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2/ "R. T." refers to the Reporter's Transcript of Proceedings.

from that of appellant.

"5. The trial court erred in permitting Kevin Patrick Rafferty to testify as a witness.

"6. The trial court erred in permitting Stanley Alvin Garelle to testify as a witness.

"7. The trial court erred in denying appellant's motion for exclusion of witnesses." [From Appellant's Opening Brief, p. 27, omitting references to Transcript pages.]

IV

STATEMENT OF THE FACTS

In April 1965, appellant agreed to furnish $1200 for a marihuana-smuggling venture involving Kevin Rafferty and Stanley Garelle. Rafferty had made a profit of about $1200 on a previous marihuana-smuggling trip, but he was destitute, having lost a subsequent load of marihuana in the mountains east of Tecate, Mexico [R. T. 91-93, 106-08].

After the agreement was made, appellant paid $720 to Rafferty, including about $400 on the night before Rafferty left San Francisco on the trip [R. T. 94, 103]. Rafferty and Garelle left San Francisco in Rafferty's Ford on approximately May 3 and traveled to San Diego, where Rafferty picked up $130 that appellant had deposited in a bank for him. They drove through Mexicali to Culiacan, where they purchased a quantity of marihuana for $650.

They returned to the United States on May 12, entering the country from Tijuana at San Ysidro, California. The marihuana was in the trunk of the vehicle. They declared no merchandise [R. T. 59-60; 95-98; 102].

The marihuana was found by an Immigration inspector at the port of entry [R. T. 51-52, 57, 59, 61]. The total weight was approximately 79 pounds [R. T. 67].

Rafferty and Garelle were arrested. They had previously agreed that if they were arrested, "we would zip our lips and not say a word", but after Rafferty thought about the five-year sentence, he talked to Garelle "and we gave Hyman up" [R. T. 109-10]. Rafferty told Customs Agent Thaine Ellis that Hyman Minkin (appellant) was involved in the matter. He agreed to make a telephone call to appellant. Agent Ellis promised Rafferty nothing in return [R. T. 83].

Agent Ellis listened during the subsequent telephone conversation between Rafferty and appellant. Rafferty told appellant that he had gotten the "stuff" or "grass". Appellant replied, "Mazeltoff", meaning "congratulations" or "good luck". Rafferty said that he was stuck in San Diego and asked for the remainder of the money that had been promised. Appellant stated that he had already sold the marihuana, meaning that it could be disposed of as soon as Rafferty reached San Francisco. He said that he would put a couple of hundred dollars in Rafferty's bank account [R. T. 127-28, 140-41, 143].

Rafferty and Garelle testified at the trial [R. T. 90, 129].

Rafferty stated that he was hoping for probation but had not been guaranteed anything. Garelle stated that he had no "arrangement" with the prosecution and that he was not promised anything like a lesser penalty [R. T. 110-11, 136-37].

Appellant testified that he had no connection with the smuggling venture. He admitted that he paid Rafferty $130 on May 5, but claimed that it was a repayment for a loan previously made by Rafferty. He admitted that he knew that Rafferty was planning to bring marihuana back from Mexico. He stated that during the May 12 telephone conversation with Rafferty the latter said, "I have got the grass" (meaning "marihuana") [R. T. 115-16, 118, 122-23, 127]. Appellant also admitted that he borrowed $200 and placed it in Rafferty's bank account on May 13, the day after the arrest and telephone conversation [R. T. 120, 123].

V

ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT ERROR IN TRYING THE CASE AND SUBMITTING IT TO THE JURY UNDER 21 U.S.C.A. 176a AND IN SENTENCING UNDER THAT STATUTE.

Appellant contends that the trial Court committed error in trying the case under Title 21, United States Code, Section 176a; in submitting it to the jury under that statute; and in sentencing appellant under that statute.

More specifically, appellant asserts that (a) he was denied due process of law because the United States Attorney had the arbitrary power to choose between different statutes which "prohibit the same conduct . . ."; [3/] (b) he was denied due process of law because co-defendants who testified against appellant were induced "to believe that prosecution for the lesser offense depended upon their giving testimony favorable to the Government"; and (c) there was a violation of the requirement of separation of powers and an unconstitutional delegation of legislative and judicial power to the executive branch of the Government.

Having failed to raise any of these issues in a timely manner in the trial Court, appellant is precluded from raising them in this appeal.

> Ramirez v. United States, 294 F. 2d 277, 283 (9th Cir. 1961);
>
> Stein v. United States, 166 F. 2d 851, 855 (9th Cir. 1948), cert. den. 334 U. S. 844 (1948).

An exception to this rule is applicable where "plain error" has occurred. Rule 52(b), Federal Rules of Criminal Procedure. It is respectfully submitted that appellant's contentions do not involve "plain error". It may be assumed that an exception also lies if it is claimed that the conviction occurred under a statute that is unconstitutionally void, but it is doubtful that appellant is

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3/ Appellant's Opening Brief, p. 28.

asking this Court to strike down Section 176a.

Assuming, arguendo, that the objection may be raised in this Court, appellant was not denied due process of law because the United States Attorney allegedly had the arbitrary power to choose between different statutes prohibiting the same conduct.

The statutes do not prohibit the same conduct. Appellant was convicted of having violated Title 21, United States Code, Section 176a, by aiding, abetting, etc., the illegal importation of marihuana [C. T. 4, 25]. Rafferty was convicted of illegal importation of marihuana without payment of tax, in violation of Title 26, United States Code, Section 4755(a)(1). Garelle was convicted of aiding and abetting a violation of the same statute, 26 U. S. C. A. 4755(a)(1) [C. T. 42-43].

The latter statute [26 U. S. C. A. 4755(a)(1)] prohibits the importation, manufacture, etc. of marihuana without registering and paying the special tax under 26 U. S. C. A. 4751 to 4753, inclusive.

26 U. S. C. A. 4755(a)(1).

This involves an annual $24 tax to be paid by marihuana importers, manufacturers, etc.

26 U. S. C. A. 4751.

However, appellant was charged with aiding abetting, etc., the smuggling and clandestine introduction of marihuana, "which marihuana should have been invoiced", and the importation of marihuana "contrary to law, in that said marihuana had not been presented for inspection, entered and declared as provided by

United States Code, Title 19, Sections 1459, 1461, 1484 and 1485 . . . " [C. T. 4, emphasis added].

The references to Sections 1484 and 1485 of Title 19 involved immaterial surplusage in this case, as the principal, Rafferty, was not a consignee.

Current v. United States, 287 F. 2d 268, 269 (9th Cir. 1961).

The relevant statutes are 19 U. S. C. A. 1459 and 19 U. S. C. A. 1461. Section 1459 provides in pertinent part that the person in charge of a vehicle must report his arrival and produce a manifest if merchandise is aboard. Section 1461 provides that merchandise imported or brought in from any contiguous country shall be unladen in the presence of a Customs officer. These are the statutes involved in the count under which appellant was convicted. While Rafferty and Garelle were convicted of importation without registering and paying the annual tax, appellant was convicted of aiding, abetting, etc., the smuggling of marihuana, which marihuana should have been invoiced, and the importation of marihuana contrary to law in that it was not presented for inspection, entered, and declared. It is clear that the two statutes do not involve identical offenses.

> "Even the same act may constitute two separate offenses, especially if the offenses are created under separate statutes. The test laid down in numerous cases is whether an additional fact or facts must be proven in one case than in the other."

[citing numerous cases].

Silverman v. United States, 59 F. 2d 636, 637 (1st Cir. 1932), cert. den. 287 U. S. 640 (1932).

The additional fact in the cases of Rafferty and Garelle was failure to register and pay the annual tax; the additional fact in appellant's case was failure to invoice the marihuana and present it for inspection. Consequently, the two offenses are not identical. Appellant is incorrect in stating that "it would be impossible to register and pay the tax on smuggled marihuana" (Appellant's Opening Brief, p. 32). The tax is an annual tax.

26 U. S. C. A. 4751.

There is no evidence in the record to sustain appellant's contention that he was punished for pleading not guilty.

Appellant also complains that the co-defendants, who testified upon behalf of the prosecution, received probation, while appellant received a prison sentence.

A similar argument was rejected by the Supreme Court of the United States in Lisenba v. California, 314 U. S. 219, 227 (1941):

"There is no adequate showing that there was a corrupt bargain with Hope, and the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning state's evidence can be no denial of due process to a convicted confederate."

In Marcella v. United States, 285 F. 2d 322, 324 (9th Cir. 1960), cert. den. 366 U. S. 911 (1961), the opinion of this Court stated:

> "Appellant urges that he was 'in the same class' as both the unindicted conspirators and the two indicted and convicted conspirators. As a law violator, that statement is true--all violated the law. But that does not mean there is no discretion in a prosecutor as to whom he will charge; whom he will indict; whom he will permit to turn state's evidence; to whom, if any, he will grant immunity. The traitor or 'turncoat,' or 'squealer,' or 'stool pigeon' is universally disliked; it is regrettable that the use of such aids to law enforcement are required, yet for some reason it is seldom the noble and respectable citizen who has had a sufficient contact with the traffic in narcotics to enable him to bring his good character to the witness stand--there to testify and describe the transactions charged."

In the determination of the sentence to be imposed, the Court may consider a defendant's assistance to the Government. This does not amount to a penalty upon others for pleading not guilty.

United States v. Vita, 209 F. Supp. 172, 174 (E. D. N. Y. 1962).

Appellant also argues that the testimony of Garelle and Rafferty was coerced and induced by the belief that they would benefit from their testimony. The record does not support this contention. Rafferty testified that he was hoping for probation but had not been guaranteed anything, and Garelle testified that he was not promised anything like a lesser penalty [R. T. 110-11, 136-37].

If Rafferty and Garelle testified in the hope of gaining some benefit, this was not a violation of appellant's Constitutional rights:

> "The fact that Contreras may have hoped for leniency affected only the weight which the jury should accord to his testimony."
>
> Diaz-Rosendo v. United States, 357 F. 2d 124, 130 (9th Cir. 1966).

> "Parenthetically we note that the cooperation of one of several joint defendants in the prosecution of others, in the hope of saving his own skin, is as old as law itself. It seems one part of the unpleasant situation that goes with, and is an integral part of crime, seemingly a necessary part of crime's solution and prosecution and ultimate control, if not prevention."
>
> United States v. Marchese, 341 F. 2d 782, 799 (9th Cir. 1965), cert. den. 382 U. S. 817 (1965).

In Audett v. United States, 265 F. 2d 837, 847 (9th Cir. 1959), cert. den. 361 U. S. 815 (1959), this Court quoted Wigmore with approval as follows:

> " 'The promise of immunity, then, being the essential element of distrust, but not being invariably made, no invariable rule should be fixed as though it had been made. Moreover, if made, its influence must vary infinitely with the nature of the charge and the personality of the accomplice. Finally, credibility is a matter of elusive variety, and it is impossible and anachronistic to determine in advance that, with or without promise, a given man's story must be distrusted.' "

Appellant's suggestion that hopes of leniency must lead to perjury is contradicted by the experience of the instant case. Garelle, who was in practically the same legal position as Rafferty, and whose testimony also is attacked as allegedly coerced, provided so little assistance to the Government that appellant's counsel stated that Garelle "couldn't even bolster his fellow confederate, Mr. Rafferty" [R. T. 176] and also stated that "We don't have any corroboration by Mr. Garelle . . . he doesn't give anything in support . . ." [R. T. 186].

In Diaz-Rosendo, supra, appellant Fernandez argued as follows:

> "No conviction should be permitted to stand

predicated in part on the testimony developed and illicited from an alleged co-defendant and co-conspirator who . . . was permitted to plead to a tax count and receive a straight probation sentence and whose testimony appears impeached. . . ." 4/

With slight variation in terminology, Fernandez was raising the same issue raised by appellant herein, contending that the conviction should not be permitted to stand. This Court affirmed the conviction.

Diaz-Rosendo, supra, at p. 130.

In regard to appellant's claim of violation of separation of powers, there was no greater delegation of authority to the prosecution than exists in any other case involving mandatory penalties and alternative statutes that might be involved in a plea of guilty to a lesser charge. Appellant implies that he could have had a lesser charge without a mandatory penalty had he pleaded guilty. This Court has stated:

"A guilty defendant must always weigh the possibility of his conviction on all counts, and the possibility of his getting the maximum sentence,

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4/ Opening Brief of Appellant Felix Anenson Fernandez, p. 57 (No. 19765). This quotation does not appear in the Court's opinion, but it is permissible to refer to appellate briefs to determine whether certain matters were considered in a previous appeal.

Murphy v. Waterfront Comm'n., 378 U.S. 52, 71 (1964).

against the possibility that he can plead to fewer, or lesser, offenses, and perhaps receive a lighter sentence."

Cortez v. United States, 337 F. 2d 699, 701 (9th Cir. 1964), cert. den. 381 U. S. 953 (1965).

B. THE DENIAL OF THE MOTION TO EXCLUDE WITNESSES DID NOT CONSTITUTE AN ABUSE OF DISCRETION.

Recognizing that a motion to exclude witnesses rests in the discretion of the trial court, appellant asserts that there was a failure to exercise discretion because the trial Court did not inquire concerning the facts. However, if appellant wanted a full hearing upon the question of exclusion of witnesses, he should have requested it. He did not do so.

In Charles v. United States, 215 F. 2d 825 (9th Cir. 1954), there was an abuse of discretion because the trial judge had a preconceived determination to deny all requests for exclusion of witnesses (at p. 827). This is not the case in the instant appeal.

Even though an abuse of discretion was found in Charles, supra, there was no reversible error:

"However, the record does not show that any witness was in the courtroom while any other witness was testifying. We therefore cannot say that appellant was prejudiced by the District Court's refusal to put the witnesses under the rule or by its failure to exercise

its discretion." (emphasis added.)

Here, as in Charles, the record does not show that Rafferty and Garelle were in the courtroom at the time that Agent Ellis testified, nor that Garelle was present when Rafferty testified. Consequently, assuming, without conceding, that error occurred, it was not reversible error.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson
PHILLIP W. JOHNSON